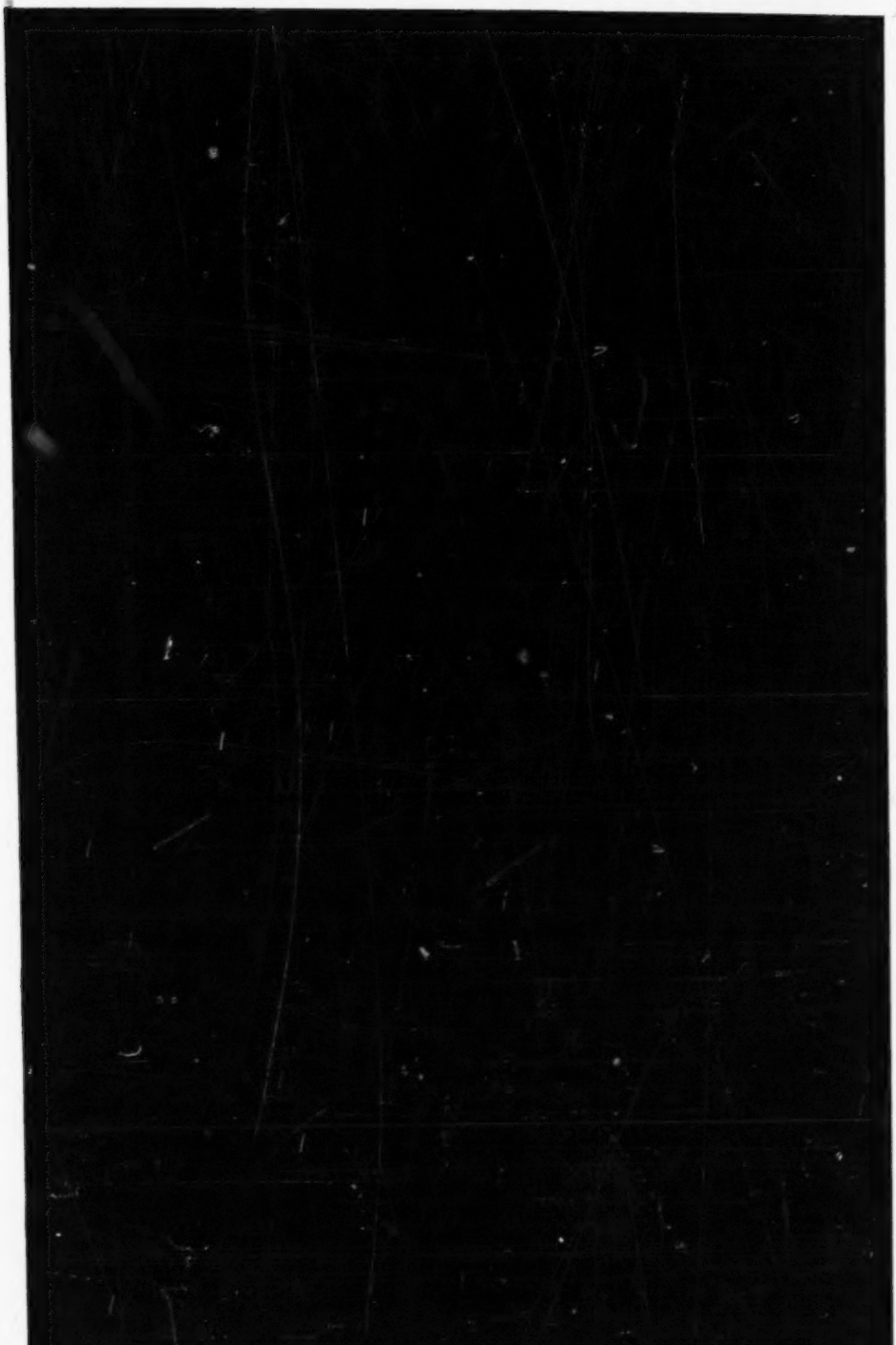

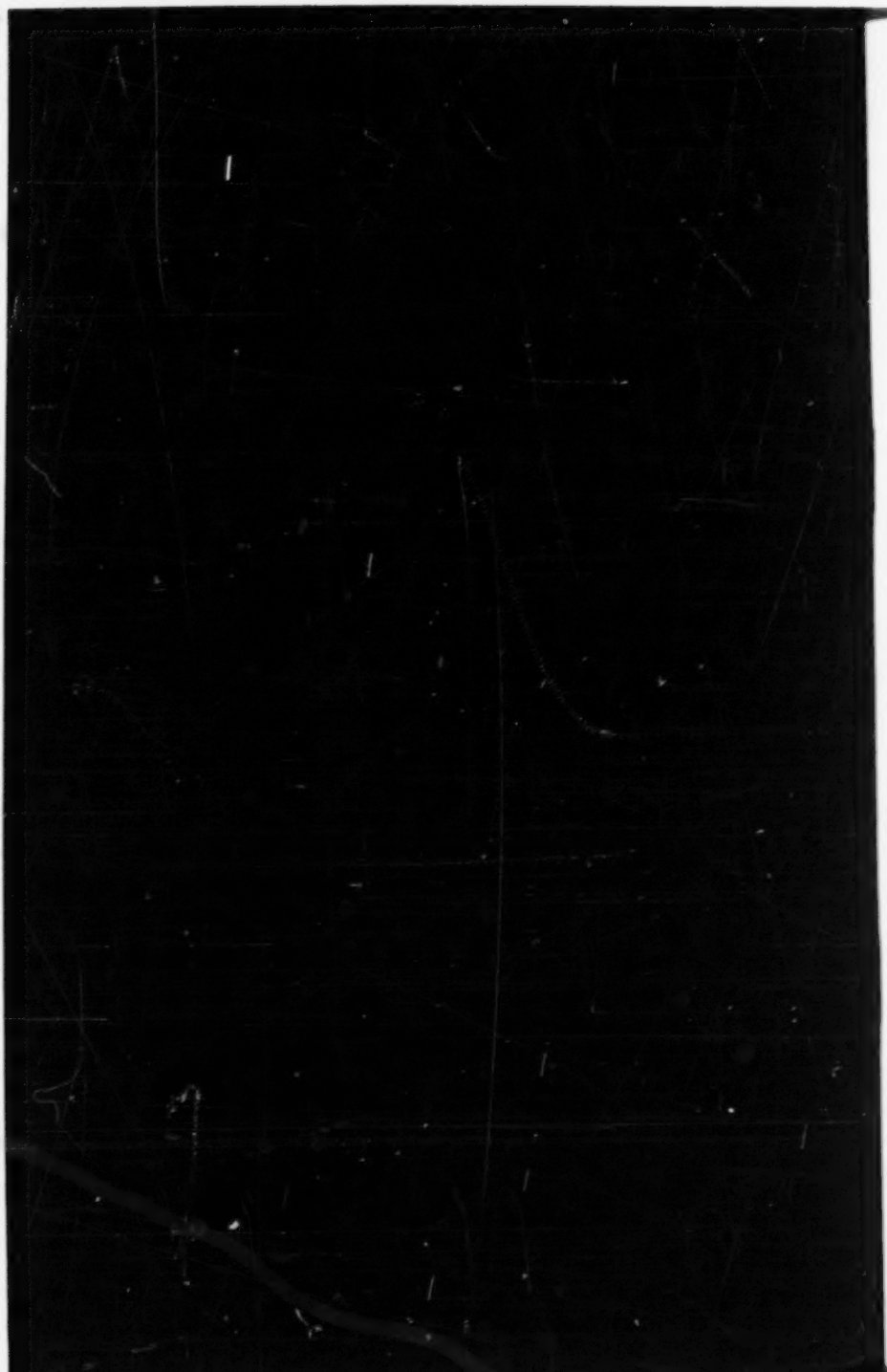

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-764

EDWARD BARRY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-781

JOHN M. GERAGHTY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-782

CLARENCE E. BRAASCH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-5752

DANIEL ARMSTRONG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Braasch Pet. App. A)[1] is reported at 505 F.2d 139.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1974 (Braasch Pet. App. B). Petitions for rehearing *en banc* were denied on November 21, 1974 (Braasch Pet. App. C). The petitions for writs of certiorari were filed on December 19, 1974 (No. 74-764), December 21, 1974 (No. 74-5752), and December 23, 1974 (Nos. 74-781 and 74-782). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was an abuse of grand jury process requiring reversal of petitioners' convictions (No. 74-764).

2. Whether it was proper for the trial court to have suppressed orders granting immunity to various government witnesses (No. 74-764).

3. Whether there was a proper joinder of counts and defendants in the indictment (Nos. 74-781, 74-782).

4. Whether police officers who use the power of their official positions to collect monthly payments

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[1] References to the various petitions and their respective appendices will be identified by the lead petitioners named, *e.g.*, "Braasch Pet.", "Braasch Pet. App."

from bar owners may be convicted of extortion "under color of official right" under 18 U.S.C. 1951 (No. 74-764).

5. Whether the admission of evidence of a payoff scheme separate from that charged in the indictment constituted error (Nos. 74-764, 74-781, 74-782).

6. Whether the evidence was sufficient to support petitioner Grana's conviction of perjury (No. 74-781).

7. Whether the prosecutor's closing argument as to petitioner Grana was proper (No. 74-781).

8. Whether the district court abused its discretion in sentencing certain petitioners (No. 74-5752).

STATUTES AND RULES INVOLVED

18 U.S.C. 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * *
>
> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of

them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

18 U.S.C. 1951 provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * * * *

(2) The term "extortion" means the obtaining of property from another, with his

> consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides in pertinent part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

STATEMENT

On December 29, 1972, twenty-four Chicago police officers were indicted by a federal grand jury in a sixteen-count indictment charging conspiracy to commit extortion, in violation of 18 U.S.C. 1951, and fifteen individual instances of false material declarations to a grand jury, in violation of 18 U.S.C. 1623. Count I alleged that all twenty-four defendants par-

ticipated in an extortion conspiracy to obtain money, under color of official right, from fifty-three retail liquor dealers located within the Eighteenth Chicago Police District. Counts II through XVI charged fifteen of the defendants named in Count I with making false material declarations to a grand jury about their participation in the conspiracy.[2]

Twenty-three defendants went to trial.[3] On October 5, 1973, following a jury trial, petitioners Barry, Cale, Catalano, Finn, McGee, Salvesen, Seno and Zakoian were found guilty of conspiracy as charged in Count I, the only count in which they were named. Petitioners Braasch, Geraghty, Armstrong, Batastini, Eshoo, Flagg, Grana, Russell, Schillinger, Swallow, and West were found guilty of conspiracy as charged in Count I and of false declaration as charged against each in one of the substantive counts. Four defendants were found not guilty of both charges.[4] The court of appeals affirmed (505 F.2d 139; Braasch Pet. App. A).

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[2] Of the twenty-three defendants who stood trial, eight were charged only in Count I, the conspiracy count. These eight were Barry, Cale, Catalano, Finn, McGee, Salvesen, Seno and Zakoian. Each of the other fifteen was charged in Count I and in one of the fifteen individual counts of false declaration.

[3] Defendant Lowell Napier, charged only in Count I, entered a plea of guilty on January 23, 1973.

[4] The following sentences were imposed by the district court:

Defendant	Sentence on Count I	Sentence on False Declaration Count
Clarence E. Braasch	5 years	1 year (consecutive)

The evidence at trial is set forth in Mr. Justice Clark's opinion for a unanimous court of appeals (Braasch Pet. App. A, pp. 2a-8a). It disclosed a wide-ranging extortion conspiracy involving virtually the entire vice squad of the Eighteenth Chicago Police District. Each defendant charged in the indictment was a police officer who, at one time or another, had been assigned to the Eighteenth District; with the

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Defendant	Sentence on Count I	Sentence on False Declaration Count
Edward J. Barry	4 years	—
John M. Geraghty	4 years	1 year (concurrent)
Daniel H. Armstrong	2 years	1 year (consecutive)
Thomas D. Batastini	2 years	1 year (consecutive)
Natale R. Cale	18 months	—
John Catalano	2 years	—
Martin D. Eshoo	2 years	1 year (consecutive)
Edward F. Finn	2 years	—
Carl Flagg	2 years	1 year (consecutive)
Philip R. Grana	18 months	1 year (concurrent)
Edward McGee	18 months	—
Emmons P. Russell	2 years	1 year (consecutive)
Harry R. Salvesen	2 years	—
Joseph A. Schillinger	18 months	1 year (consecutive)
Steve L. Seno	2 years	—
William D. Swallow	18 months	1 year (concurrent)
Thomas D. West	18 months	1 year (consecutive)
Mike Zakoian	18 months	—

Early parole eligibility for Geraghty, Catalano and Seno was afforded by the district court under 18 U.S.C. 4208(a)(2).

exception of petitioner Braasch, each had been assigned to the district's vice squad. At any one time, the vice squad was composed of approximately fifteen officers, who were divided between a day and a night shift. All members of the vice squad were patrolmen except the "vice coordinator," who was a sergeant of police in charge of the entire squad. The vice coordinator was directly responsible to the District Commander, the highest ranking officer in the police district. Among their duties, these vice officers were responsible for the enforcement of liquor laws as they related to the bars and taverns in the Eighteenth District.

Petitioner Braasch was the District Commander from approximately August 1966 to May 1970. From the fall of 1966 until March 1967, his vice coordinator was Robert W. Fischer. Fischer was succeeded in that position by petitioner Barry, who served from approximately April 1967 until August 1970. Barry was then replaced by petitioner Geraghty, who served as vice coordinator until July 1972.

The government presented the testimony of 48 witnesses who were either owners or employees of the 53 liquor establishments from which money was collected. Seven former Chicago police officers, who, at one time or another were assigned to the Eighteenth District vice squad, also testified.[5] These of-

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[5] The former vice squad officers who testified for the government were John A. Cello, Jr., Edward Rifkin, Lowell Napier, Salvatore Mascolino, Robert W. Fischer, Charles DuShane, and Anthony Corsentino.

ficers testified about their involvement in the monthly collection of money from bars in the Eighteenth District and the distribution of that money to members of the vice squad. The group of bars that paid money each month to the vice squad was called "the club" or the "vice club," and the money collected was called the "package" or the "vice package."

The evidence at the seven-week-long trial, which covered 6,836 pages of transcript, established that the monthly collection and distribution of money had existed in the Eighteenth District vice squad since at least 1961. In the middle of 1966, the collections stopped for a period of about six months while Captain James Holzman was District Commander. When Braasch replaced Holzman as District Commander in August 1966, the collections began again, and that event marked the beginning of the conspiracy charged in the indictment.

In the fall of 1966, shortly after Fischer became Braasch's vice coordinator, a gambler by the name of Bill Gold, who represented certain gambling interests and night clubs, contacted Fischer and, through him, offered to pay Braasch a large sum of money each month in order to protect those involved in the night clubs and gambling operations from arrest or harassment by Eighteenth District police officers. Braasch agreed to this arrangement, and this marked the beginning of the so-called "Big Ten" or "Big Club" operation.[6] Fischer and Barry (who succeeded Fisch-

[6] The "Big Club" operation was not alleged in the indictment. Our argument concerning the admissibility of this evidence is discussed at pp. 23-26, *infra*.

er as vice coordinator), served as Braasch's "bagmen" in this operation, by collecting the money and turning it over to him. The money was then distributed among Braasch, his vice coordinator, and certain other designated officers.

Other members of the vice squad, having heard of the "Big Club" operation, approached Fischer to discuss the possibility of resuming the collection of money from bars. Fischer told them he would have to clear it with Braasch. Braasch agreed that the vice men should be allowed to collect money from certain bars because, since he and Fischer had "their own thing going," the vice men should be able "to make a buck for themselves" as well (Braasch Pet. App. A, p. 4a). Braasch and Fischer also decided not to take a cut of the vice club money, since they had "their own thing going" and they should not get too "hungry" (*id.* at 5a). However, Braasch instructed Fischer to obtain a list of the bars from which the vice men planned to collect, so that they could review it to make sure it did not include any of the ten establishments that made up the "Big Club." Such a list was to be prepared each month for Braasch's review.

In November 1966, the vice men began collecting money on a monthly basis from a large number of bars in the Eighteenth District. The bar owners were required to pay $100 per month to the vice squad. In return, they were to be free from harassment by members of the squad and were not to be subjected to "shakedowns" by individual vice squad members. The

amount to be collected and the procedures to be followed as new bars were added to the list were more specifically determined at a meeting of the vice squad held in late 1966 or early 1967.

The required list was prepared each month and given to Fischer, who presented it to Braasch for his review. Occasionally Braasch crossed off the names of bars from which he did not want the vice men collecting. After Barry replaced Fischer as vice coordinator, he assumed the monthly duty of taking the list to Braasch.

The money that was collected from the bars was distributed among the members of the vice squad by officers Cello, Rifkin, Mascolino and Napier. The amounts received each month ranged from $150 to $500 per man.

In August 1970, shortly after Braasch had completed his tour as District Commander, petitioner Geraghty replaced Barry as vice coordinator. After he assumed that position he instructed vice officers Rifkin and Mascolino to collect the money from the bars each month and deliver it directly to him. Thereafter, Geraghty assumed the monthly responsibility of personally distributing the money to the vice officers.

Subsequently, fifteen of the petitioners appeared before the grand jury and, in substance, denied participation in the extortion scheme.

ARGUMENT

1. Petitioners in No. 74-764 contend that the government abused the process of the grand jury by using grand jury subpoenas to summon certain bar owners before a grand jury after the return of the indictment in the instant case; the owners thereupon invoked their privilege against self-incrimination and were excused. Petitioners claim that the government later used the existence of these grand jury subpoenas to coerce the subsequent appearance of these witnesses in the federal building, not for the purpose of appearing before the grand jury but for the sole purpose of granting them immunity to compel their testimony at petitioners' trial in this case. The record, however, refutes this contention.

The record demonstrates that the grand jury continued its investigation of police corruption in the Eighteenth District after it returned the indictment in the instant case on December 29, 1972. The need for the continuation of this investigation is reflected by evidence presented during the course of trial, which established that corruption among police officers in the Eighteenth District was not limited to the plainclothes vice officers indicted in this case, but extended to uniformed policemen also assigned to that district (Tr. 980-983). This continuing investigation resulted in another indictment, returned on May 31, 1973, charging six uniformed Eighteenth District police officers with extortion from nine of the bar

owners named in the instant indictment as victims.[7] As Mr. Justice Clark said in his opinion for the court below (Braasch Pet. App. A, pp. 11a-12a):

> Appellants next complain that the Government abused the grand jury process by calling prospective witnesses before the Grand Jury for the purpose of preparing an already pending indictment for trial. The short answer is that the Government has every right to interrogate witnesses on subjects relevant to a continuing grand jury investigation even when the evidence received may also relate to a pending indictment. *Beverly* v. *United States*, 468 F. 2d 732, 742 (5th Cir. 1972). Appellants have shown no prejudice from these occurrences and their contention must fail. *United States* v. *Star*, 470 F. 2d 1214, 1217 (9th Cir. 1972).

Nor would it have been necessary for the government to use grand jury subpoenas for the purpose alleged. Regular trial subpoenas could and would have been used, if necessary, to obtain the appearance of witnesses before the court in order to be granted immunity. There is no indication that the witnesses felt "coerced" into appearing merely because they had previously been subpoenaed by the grand jury. Moreover, the granting of immunity prior to trial was proper both legally (18 U.S.C. 6003), in light of the likelihood that the witnesses would invoke the Fifth Amendment, and from the standpoint of the conser-

[7] This second indictment was No. 73 CR 401 in the United States District Court for the Northern District of Illinois, Eastern Division.

vation of judicial time. To have waited to seek immunity until the Fifth Amendment was invoked at trial would have created significant delays.

In light of all of the circumstances, we submit that the prosecutors followed proper and legitimate procedures and did not misuse the grand jury process. See *Beverly* v. *United States*, 468 F.2d 732, 743 (C.A. 5); *United States* v. *Dardi*, 330 F.2d 316, 336 (C.A. 2), certiorari denied, 379 U.S. 845. In any event, petitioners have not indicated how, even if there were an improper use of the grand jury, they were prejudiced thereby. See *United States* v. *Star*, 470 F.2d 1214, 1217 (C.A. 9); *United States* v. *Fisher*, 455 F.2d 1101, 1104-1105 (C.A. 2). As these witnesses possessed relevant evidence, the government was entitled to seek immunity for them, and their presence could have been compelled if they had refused to appear otherwise. Cf. *United States* v. *Fisher*, *supra*. While the witnesses might have remedies to rectify any irregularities in obtaining their testimony, such irregularities relate to matters personal to the witnesses about which petitioners have no standing to complain.

2. At the time the immunity orders were entered, the government's petitions, supporting papers, and the orders themselves were "suppressed" (*i.e.*, placed under seal). The defendants were not notified that immunity had been granted to the various bar owners, and their pre-trial motion asking the district court to rescind its suppression order was denied. As noted above, the government chose to grant these

witnesses trial immunity prior to trial in order to avoid the inevitable long and unnecessary delays that would occur during the course of the trial if the court were required to interrupt the presentation of evidence fifty or more times to grant a witness immunity. Petitioners in No. 74-764 contend that the suppression of the immunity orders denied them their Sixth Amendment right to the effective assistance of counsel.

This contention must fail because, as the court of appeals correctly held (Braasch Pet. App. A, pp. 10a-11a), the petitioners lack standing to contest the propriety of the immunity orders. See *United States* v. *Lewis*, 456 F.2d 404, 409-410 (C.A. 3); *Lopez* v. *Burke*, 413 F.2d 992, 994 (C.A. 7). It is the immunized witness whose rights are involved, and it is only he who can challenge the granting of immunity.

While petitioners' lack of standing may not, in and of itself, dispose of the precise issue of the propriety of the suppression of the immunity orders, it does provide the basic rationale for the court of appeals' holding. As the court held (Braasch Pet. App. A, p. 11a):

> The suppression orders were entered by Chief Judge Edwin A. Robson in March of 1973, "[i]n order to encourage further disclosures and in order to protect the personal safety and security of the informers and potential witnesses by concealing their identity." Since, as we have said, a defendant has no standing to contest the propriety of a grant of immunity, it follows that appellants had no right to be present at the im-

> munity hearings nor any right to obtain the identity of Government witnesses by or through being furnished copies of the orders granting immunity. Chief Judge Robson denied appellants' motions to lift the suppression order and we agree with his conclusion on the matter. It also follows that defense counsel had no right to be at the immunity hearings.

As the court of appeals recognized, petitioners' lack of standing to challenge the immunity orders rebuts their contention that their attorneys had any right to be present at the hearing or even to be notified of it. And, in reality, their presence would have been of no benefit to petitioners. Once the statutory requirements of 18 U.S.C. 6003 are complied with by the government, there exists no discretion on the part of the court to deny the request for immunity. *Ullmann* v. *United States*, 350 U.S. 422, 432-434; *United States* v. *Wilcox*, 450 F.2d 1131, 1138, n. 9 (C.A. 5), certiorari denied, 405 U.S. 917; *Licata* v. *United States*, 429 F.2d 1177, 1179 (C.A. 9), vacated on other grounds, 400 U.S. 938; *Ellis* v. *United States*, 416 F.2d 791, 796-797 (C.A.D.C.). Thus, petitioners' attorneys would have served no legitimate function at such a hearing and would simply have learned the names of some of the potential government witnesses, information to which a defendant in a non-capital criminal case is not entitled. See, *e.g.*, *United States* v. *Addonizio*, 451 F.2d 49, 64 (C.A. 3), certiorari denied, 405 U.S. 936; *United States* v. *Conder*, 423 F.2d 904, 910 (C.A. 6); *Rosenzweig* v.

United States, 412 F.2d 844, 845 (C.A. 9); *United States* v. *Persico*, 425 F.2d 1375, 1378 (C.A. 2), certiorari denied, 400 U.S. 869. Compare 18 U.S.C. 3432.

In light of the valid reason underlying the suppression of the immunity orders—concern for the personal safety of the witnesses (*United States* v. *Persico*, *supra*, 425 F.2d at 1383)—and in the absence of demonstrated prejudice to petitioners, there exists no reversible error in this respect.[8]

3. Petitioners Braasch (No. 74-782), Grana and Geraghty (No. 74-781) argue that they were prejudiced by the joinder of the conspiracy count against them with other counts charging them with perjury. Petitioners Grana, Geraghty, McGee, and Zakoian (No. 74-781) argue that they were prejudiced by the joinder of the conspiracy count against each of them with all other defendants' perjury counts—McGee and Zakoian because they were not charged with perjury at all, and Grana and Geraghty because there was no allegation of a common plan to give false testimony and because the trial jury would naturally "infer that because a Grand Jury believed that fifteen officers lied about receiving money there must

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[8] Petitioners were not prejudiced by the suppression of the immunity orders. Before any of the immunized tavern owners testified, each defense counsel was given a sample copy of the immunity order entered with respect to each witness (Tr. 501-502). Since petitioners were fully apprised of the existence and the extent of the immunity orders before any tavern owner testified, the potential impeachment value of such orders was preserved for them.

therefore be some substance to the conspiracy count which charged them all with receiving the money" (Geraghty Pet. 9). Petitioner Braasch, alleging prejudicial joinder of defendants, makes a similar argument. He contends (Braasch Pet. 23-24) that he was prejudiced by being joined for trial with fourteen "accomplices" who had been charged with perjury and thus were not to be believed, while the witnesses against him were "accomplices" not charged with perjury and thus, by inference, were credible.

Under Rule 8(b), Fed. R. Crim. P., offenses arising out of the "same series of acts or transactions" may be joined together in a single indictment. Even dissimilar acts, such as conspiracy to commit extortion and perjury, may be joined against multiple defendants if they arise out of the "same series of acts or transactions." See, *e.g.*, *United States* v. *Friedman*, 445 F. 2d 1076, 1082-1083 (C.A. 9). Thus, where a perjury count relates to false testimony before the grand jury investigating the subject matter that results in the main charge, joinder is permissible. See *United States* v. *Jones*, 374 F. 2d 414 (C.A. 2); *United States* v. *Verra*, 203 F. Supp. 87, 90 (S.D. N.Y.). Here, the nexus between the conspiracy and false declaration counts was sufficiently close to be deemed a "series of acts" under Rule 8(b), and joinder was therefore proper. See, *e.g.*, *United States* v. *Gill*, 490 F. 2d 233, 238-239 (C.A. 7), certiorari denied, 417 U.S. 968.

Nor is there merit to petitioners' contention that a severance should have been granted under Rule

14, Fed. R. Crim. P. They suggest that it is inherently prejudicial to join a false declaration count with a count charging the substantive crime that is being investigated during the questioning that led to the alleged false statements and that the petit jury's decision on the extortion charge necessarily was influenced by its realization, induced by the presence of the false declaration count, that the grand jury had heard petitioners testify on the matter and did not believe them or their co-defendants.

However, the possibility that a petit jury may be influenced in an improper manner by the conclusion of the grand jury to indict a defendant is inherent in every case proceeded upon by indictment. The question is whether this acceptable, unavoidable consequence of the grand jury system is somehow so exacerbated by the joinder of a false declaration charge as to create a real and serious danger of impropriety sufficiently grave that the normal interest in efficient disposition of criminal charges by joinder of charges arising out of the "same series of acts or transactions" and involving the presentation of some of the same evidence is overbalanced thereby. The Seventh Circuit, sitting *en banc*, recently answered that precise question in *United States* v. *Pacente*, 503 F.2d 543, 547, certiorari denied, December 9, 1974, No. 74-243:

> * * * [I]t is the judgment of a majority of this court that it is an unwarranted over-refinement to speculate that * * * [there is] a significant danger that the trial jurors, acting to-

> gether, will give weight to the conclusion reached by the grand jurors and fail to decide the issues of fact according to their own proper evaluation of the evidence.

Accordingly, we submit that it was not improper in the circumstances of this case for the trial court to have refused to sever either counts or defendants. See *United States* v. *Gill*, *supra*, 490 F.2d at 239; *United States* v. *Verra*, *supra*, 203 F. Supp. at 90-91; *United States* v. *Haim*, 218 F. Supp. 922, 932 (S.D. N.Y.).

Moreover, as the court of appeals pointed out, the trial court gave careful instructions admonishing the jury that each count and each defendant was to be given separate consideration (Braasch Pet. App. A, p. 17a):

> Moreover in the instant case, the trial judge in his charge specifically instructed the jury to give separate consideration to each count and to render separate verdicts on each defendant. The charge admonished the jury further that each defendant was entitled to have his guilt or innocence determined from his own conduct and from the evidence as applied to him as if he were being tried alone and that the guilt or innocence of any one defendant should not influence the jury's verdict respecting the others. Further, with regard to the perjury counts, the charge instructed that testimony introduced as to them was to be considered only as evidence of the false material declaration charge and that the jury should not consider that testimony as evidence of any defendant's guilt as to Count One of the indictment. The fact that the jury found

> four of the defendants not guilty on both the conspiracy and the respective perjury counts showed that they not only knew what they were doing but did what they intended. * * * We add that the massive duplication of effort entailed in separate trials is not justified absent a more specific claim of prejudice than the one now urged by appellants.

As this Court has noted: "Our theory of trial relies upon the ability of a jury to follow instructions." *Opper* v. *United States*, 348 U.S. 84, 95. There is no showing that the theory lacks validity in the circumstances of this case.

In sum, the grant or denial of a severance under Rule 14 is within the sound discretion of the district court, and its decision will not be reversed absent an abuse of discretion. *Opper* v. *United States*, *supra*, 348 U.S. at 95; *United States* v. *Pacente*, *supra*, 503 F.2d at 546; *United States* v. *Gill*, *supra*, 490 F.2d at 239; *United States* v. *Hutul*, 416 F.2d 607, 621 (C.A. 7), certiorari denied, 396 U.S. 1012. The court of appeals found no such abuse, and there is, we submit, no reason for further review of that determination.

4. Petitioners in No. 74-764 argue that while the indictment charged extortion "under color of official right," the evidence showed only extortion through fear of economic harm and, hence, there was a fatal variance between the crime charged and the proof. Petitioners place an unwarranted and unduly narrow interpretation—one unintended by Congress—upon the phrase "under color of official right" as used in

18 U.S.C. 1951. The court of appeals correctly held that petitioners' actions here were clearly of the type prohibited by the statute as extortion "under color of official right" (Braasch Pet. App. A, p. 19a):

> Appellants, however, overlook the fact that the evidence shows that the conspirators used the power and authority vested in them by reason of their office to obtain money not due them or due the office. The use of office to obtain payments is the crux of the statutory requirement of "under color of official right", and appellants' wrongful use of official power was obviously the basis of this extortion. See *United States* v. *Staszcuk*, [502 F.2d 875 (C.A. 7)]. It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties *which can only be undertaken because of his official position.* So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration. [Emphasis supplied.]

In effect, it is an official's suspension of independent judgment and impartial determination on the merits of each case, in return for payments of money, which is made unlawful by this portion of Section 1951. *United States* v. *Staszcuk*, 502 F.2d 875 (C.A. 7); *United States* v. *Hyde*, 448 F.2d 815 (C.A. 5), certiorari denied, 404 U.S. 1058. Thus, when an official coerces one to pay in order to prevent that offi-

cial from performing a legal duty, he has committed extortion under color of official right. *United States* v. *Hyde, supra*, 448 F.2d at 832-833. As the court of appeals said here (Braasch Pet. App. A, p. 20a): "[I]t was appellants' misuse of power of their office that triggered the harm as well as the payments in this case and made it the type of extortion charged in the indictment." Cf. *United States* v. *Classic*, 313 U.S. 299, 326; *United States* v. *Senak*, 477 F.2d 304, 306-307 (C.A. 7), certiorari denied, 414 U.S. 856.

5. Evidence of a conspiracy not charged in the instant indictment—the so-called "Big Club" conspiracy—was admitted to show the motives of petitioners Braasch and Barry for participating, without financial gain, in the "vice club" conspiracy charged in the indictment. Petitioner Braasch (No. 74-782) contends that the introduction of this evidence was erroneous as to him in three respects: (1) its prejudicial impact outweighed its probative value in light of the amount of "Big Club" evidence introduced (in this contention he is joined by petitioner Barry (No. 74-764)); (2) he was denied his right to be tried on the "Big Club" conspiracy only pursuant to an indictment; and (3) he was denied due process and notice of the nature of the charges against him. Petitioners Geraghty, Grana, McGee and Zakoian (No. 74-781) also contend that they were prejudiced by this evidence introduced against Braasch and Barry.

On this issue, we rely primarily upon the opinion of the court of appeals (Braasch Pet. App. A, pp.

14a-16a). Briefly, the court first recognized the established principle that evidence of "other crimes" is admissible to prove motive and intent and that the trial court is given wide discretion in balancing the probative value of such evidence against its prejudicial impact. In light of the crucial importance in this case of proving motive as to Braasch and Barry (*i.e.*, their desire to protect their "Big Club" operation), the trial court correctly decided that the scales tipped in favor of admissibility of the evidence as to Braasch and Barry. Indeed, the evidence that was admitted concerning the "Big Club" was not so excessively detailed as to create a "trial within a trial" [9] and was sufficiently plain, clear and conclusive that its probative value outweighed potential prejudice. See *United States* v. *Broadway*, 477 F.2d 991, 994-995 (C.A. 5); *United States* v. *Spica*, 413 F.2d 129, 131 (C.A. 8).

Nor was Braasch denied his right to be tried upon the charges alleged in the indictment. There was no way to try the case without introducing some evidence about the "Big Club," since those payoffs were intertwined with the others. Moreover, on three occasions the trial judge gave careful limiting instructions concerning the narrow purpose for which the jury was to consider this evidence (Tr. 4682-4684, 5261-5263, 7556-7559). It is not to be assumed that the jury disregarded these instructions. *Opper* v.

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[9] The other crimes evidence came mostly from government witness Robert Fischer—only one of over fifty government witnesses.

United States, supra. As Mr. Justice Clark said in his opinion for the court below (Braasch Pet. App. A, p. 16a):

> True it is that detailed evidence as to a similar, contemporaneous conspiracy has a potentially prejudicial effect, but here that effect was outweighed by the importance of this motive evidence as well as the District Court's cautious and thorough limiting instructions which were delivered to the jury not only at the conclusion of witness Fischer's direct examination but again after witnesses Cello and Murphy testified briefly as to their involvement in the "big club", and for a third time in the final charge to the jury. These instructions specified that the "big club" evidence was not to be used against any other of the defendants besides Braasch and Barry, and as to them it was only to be considered as it relates to their motive and intent to participate in the "little club" conspiracy charged in the indictment. We have no reason to doubt the effectiveness of these carefully drawn instructions. *See United States* v. *Pauldino*, 443 F. 2d 1108, 1114 (10th Cir.), cert. denied, 404 U.S. 882 (1971). The jury verdict—in which four of the twenty three defendants were acquitted —itself supports this conclusion.

Finally, Braasch claims that he was not given adequate notice that the government intended to introduce this evidence. The record, however, does not support this claim. Sixteen days prior to the time that Braasch's lawyer began his cross-examination of Fischer, government counsel informed him of their

intention to introduce evidence on the subject of motive, through Fischer's testimony, as to Braasch's involvement in uncharged criminal conduct. At that time, the government set forth the general nature of Fischer's prospective testimony with respect to the "Big Club" scheme (Tr. 2352-2358). Thus, as the court below noted (Braasch Pet. App. A, p. 16a), petitioner Braasch "had both notice and opportunity to meet the Government's proof of concurrent criminal conduct."

The contention raised by the petitioners against whom the "Big Club" evidence was not admitted is likewise unpersuasive. In a joint trial, evidence as to other crimes may be admitted against some defendants but not others, so long as the jury is properly instructed concerning the parties against whom the evidence may be admitted, as it was here. See *United States* v. *Pauldino*, 443 F.2d 1108, 1114 (C.A. 10), certiorari denied, 404 U.S. 882; *Oden* v. *United States*, 410 F.2d 103, 104 (C.A. 5), certiorari denied, 396 U.S. 863. Thus, as the court of appeals noted (Braasch Pet. App. A, p. 16a), the most important element militating against petitioners' contention is the fact that the trial judge's limiting instruction regarding the "Big Club" evidence was read to the jury no fewer than three times (Tr. 4682-4684; 5261-5263; 7556-7559).

6. Count VII alleged, in substance, that petitioner Grana (No. 74-781) made the following false declarations when he testified before a federal grand jury: (1) he had never received any money from

another Chicago police officer, knowing that the money originated with a bar or tavern; (2) while employed as a Chicago police officer in the Eighteenth District, he had no knowledge that certain members of the District vice squad were collecting money from bars or taverns; and (3) he had no knowledge that this money was then being divided among other members of the Eighteenth District vice squad.

Petitioner Grana, relying on this Court's opinion in *Bronston* v. *United States*, 409 U.S. 352, contends that he was wrongly convicted under 18 U.S.C. 1623 because his answer to one of the questions which formed the basis of the false declaration charge was "literally true" (Geraghty Pet. 13) since the proof showed that only *some* of the members of the vice squad had divided the pay-offs and his negative response was to a question covering *all* of the members of the vice-squad.[10]

However, even if petitioner is accurate in characterizing his response to this question as "literally true," his conviction for false declaration was proper nevertheless; for it was only necessary for the jury to find that any one of the three alleged false material declarations charged was proved beyond a reasonable doubt (see *United States* v. *Pollack*, 474 F.2d 828, 831 (C.A. 2)), and the jury was so instructed

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[10] The question asked and Grana's answer were as follows (Grana Grand Jury Tr. 10; Gov't. Exh. 74, p. 10):

> Q. Sir, when you were in the 18th District, were you aware that at that time certain members of the vice squad were collecting money from various taverns

(Tr. 7553-7554). While two of the alleged false declarations—that he had no knowledge that certain officers were collecting money and that the money collected was being divided among members of the vice squad—were in response to a compound question (see note 10, *supra*) to which petitioner's response may have been "literally true," there was more than sufficient evidence to support a finding that petitioner lied about his own receipt of money from another police officer.[11]

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and bars; and—that the money was being split between all members of the vice squad?

A. No, sir, I was not.

[11] The series of questions asked and Grana's responses were as follows (Grana Grand Jury Tr. 6-7; Gov't. Exh. 74, pp. 6-7):

Q. Sir, while you were assigned to the 18th Police District did you ever ask for money from any bar owner or tavern owner or other businessman while performing your duties as a Chicago Police Officer?

A. No, Sir. I did not.

I wasn't working on a bar detail.

Q. Sir, while you were employed in the 18th District, did you ever receive any money from any bar owner or tavern owner or other businessman—

A. No. Sir.

Q. —while performing your duties as a Chicago Police Officer?

A. No, sir.

Q. Sir, while you were assigned to the 18th Police District, did you ever receive any money from any other Chicago Police Officer?

A. Just a contingency money, or the informant money.

Q. Excluding the contingency money, and excluding any repayment of personal loans that you may have loaned to a friend at the Chicago Police Department in the 18th District,

Indeed, Grana's conviction of conspiracy to commit extortion makes clear that the jury must also have concluded that his grand jury testimony, that he never received money from any bar owner was false. The fact that the jury found beyond a reasonable doubt that Grana had participated in a conspiracy to extort money from the tavern owners necessarily meant that it found that he lied to the grand jury when asked about that very matter.[12] Thus, even if it also concluded that he also made the two "literally true" false declarations, the conviction of false declaration can stand.

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excluding those two, have you ever received any money from any other policeman?

A. No, sir.

Q. Specifically, sir, while assigned to the 18th District, have you ever received any money from any other Chicago Policeman knowing that money originated with a bar owner or tavern owner or another businessman?

A. No, sir, I did not.

[12] The evidence in respect to both counts came largely from Edward Rifkin, an unindicted co-conspirator. It showed that Grana was a partner of Rifkin, one of the "vice club" collectors (Tr. 1282). After joining the Eighteenth District vice squad, Grana received his share of the "vice package" each month from Rifkin for a period of several months, until petitioner Geraghty became the vice coordinator and took over the responsibility of distributing the "package" (Tr. 1372-1373.) Grana accompanied Rifkin to the bars from which Rifkin was obtaining money on a monthly basis (Tr. 1282), but he was not physically present when the monthly payment was given to Rifkin by the bar owners (Tr. 1442). Moreover, Sal Strazzante, an employee of the King's Ransom, testified that, after Rifkin discontinued collecting the monthly payment from the King's Ransom, a vice officer who identified himself

In any event, petitioner Grana's one-year sentence on the false declaration count was made concurrent with his 18-month sentence on the conspiracy count. Accordingly, it is unnecessary for this Court to consider his challenge to the conviction on the false declaration count. *Barnes* v. *United States*, 412 U.S. 837, 848 and n. 16.

7. Government witness Salvatore Strazzante testified that he made monthly payments of money to vice officer Rifkin until late 1971 (Tr. 4154). He further testified that after Rifkin discontinued collecting his monthly payment, he began making the payments to a vice officer named Grana (Tr. 4154-4157). However, when asked if he saw that officer in the courtroom, he identified petitioner Schillinger (Tr. 4157-4158). It was stipulated that Schillinger could not have received these particular payments (Tr. 4166).

During closing argument, government counsel asked the jury to notice the similarities between the appearances of Grana and Schillinger and infer that the witness had made an honest mistake in his identification (Tr. 7048). This argument was not improper, as petitioner Grana contends, for it merely sought to remind the jury of evidence that had been

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as Grana began making this monthly collection of money from the King's Ransom (Tr. 4154-4157). While Strazzante was unable to identify Grana as the vice officer to whom he made these payments (Tr. 4157-4158), there was a strong inference that the officer who identified himself to Strazzante as vice officer Grana was in fact the defendant Grana (Tr. 7047-7050). See pp. 30-31, *infra*.

produced and to persuade its members to draw legitimate, relevant inferences therefrom. *United States* v. *Fidanzi*, 411 F.2d 1361, 1362 (C.A. 7), certiorari denied, 396 U.S. 929. Calling to the jury's attention the physical characteristics of certain defendants on the issue of identification is not improper, so long as the matters of identification adverted to are before the jury and not uniquely within the prosecutor's knowledge. See *United States* v. *Borelli*, 435 F.2d 500, 503 (C.A. 2), certiorari denied, 401 U.S. 946; *Hayes* v. *United States*, 368 F.2d 814, 815 (C.A. 9). In sum, the prosecutor in his argument only presented what the ~~jury~~ jurors could reasonably have inferred from all the evidence and from their own observations. Cf. *United States* v. *Lawson*, 483 F.2d 535, 539 (C.A. 8), certiorari denied, 414 U.S. 1133.

8. Petitioners Armstrong, Batastini, Eshoo, Flagg, Russell, Schillinger and West (No. 74-5752) contend that the district court abused its discretion in imposing consecutive sentences upon them on the conspiracy and false declaration counts. They assert that their consecutive sentences were a result of the fact that they testified at trial, whereas other defendants who did not testify received concurrent terms on the conspiracy and false declaration convictions.

It is established that the district court has wide discretion to determine the appropriate sentence to be imposed. *United States* v. *Tucker*, 404 U.S. 443, 446-447. When the sentence imposed is within the statutory limits it is generally not subject to review absent exceptional circumstances, such as a proced-

ural irregularity or consideration by the sentencing court of illegitimate or irrelevant matters. See *United States* v. *Tucker*, *supra*; *Gore* v. *United States*, 357 U.S. 386, 393; *United States* v. *Grene*, 455 F.2d 376, 377 (C.A. 5), certiorari denied, 409 U.S. 856; *United States* v. *Gill*, *supra*, 490 F.2d at 241. In the instant case, there has been no showing of any such exceptional circumstance. There has been no affirmative showing that the sentencing judge has a policy of enhancing punishment because a defendant testifies at trial, nor has there been a showing that this was even a consideration in this particular case. The sentences were within the statutory maximum and were not shown to be the product of improper considerations; they thus constituted a proper exercise of the trial court's discretion.[13]

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[13] Even if one were to speculate that the district judge imposed consecutive sentences on those petitioners who testified at trial merely because they so testified, there is respectable authority supporting such an action—if he believed that they testified falsely. The Fourth, Sixth and Ninth Circuits have approved the practice of relying upon false trial testimony to enhance sentence. See *United States* v. *Moore*, 484 F.2d 1284, 1287-1288 (C.A. 4); *United States* v. *Wallace*, 418 F.2d 876 (C.A. 6); *United States* v. *Cluchette*, 465 F.2d 749, 754 (C.A. 9). Compare *United States* v. *Phillips*, C.A. 6, No. 74-1216, decided February 11, 1975, in which the sentencing judge imposed the maximum sentence on the stated ground that he believed the defendant had perjured himself, which the court of appeals found impermissible; the court did not even mention its earlier decision in *Wallace*. The rule that a sentencing court may consider the defendant's credibility as a witness has been rejected by the District of Columbia Cir-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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cuit. See *Scott* v. *United States*, 419 F.2d 264, 268 (C.A.D.C.). However, the instant case is not an appropriate case in which to resolve the conflict, because here, as we have noted, there has been no affirmative showing, only speculation, that the sentencing judge increased the sentence imposed because of his belief that petitioners testified falsely or because they testified at all. In all of the decided cases, on the other hand, the judge has expressly identified for the record the basis for his increased sentence.

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